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IN THE

Supreme Court of the United States.

October Term, 1906.

CLARENCE A. BRANDENBURG,
Plaintiff in Error,
v.
THE DISTRICT OF COLUMBIA.

No. 191.

Brief of Plaintiff in Error.

CLARENCE A. BRANDENBURG,
EDWIN C. BRANDENBURG,
Attorneys for Plaintiff in Error.

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v.
THE DISTRICT OF COLUMBIA. } No. 191.

BRIEF OF PLAINTIFF IN ERROR.

This case comes before this court on a writ of error to the Court of Appeals of the District of Columbia. It is a proceeding begun in the Supreme Court of the District of Columbia to set aside an assessment of certain taxes, levied against lots in square 69, in the city of Washington, to cover the cost of opening a minor street through said square.

The original petition was filed in the year 1900 and the amended petition on June 3, 1904. On the filing of the petition, a writ of *certiorari* was issued, to which respondent filed a return (Record, p. 5) certifying to the court the record of the proceedings relating to said assessment.

The petition shows that the petitioner was, in 1898, and still is, the owner in fee of lots 42 and 43 in square 69, the same abutting 20.43 feet and 20 feet respectively on a public alley 30 feet in width running east and west in said square and opening upon 22d street, west, and that said lots ran back to a depth of 75 feet. Pursuant to the

provisions of an act of Congress approved July 22, 1892, authorizing the opening and extending of alleys, as amended by the act of Congress approved August 24, 1894, extending its provisions so as to authorize the opening of minor streets, the Commissioners of the District of Columbia, upon the request of the alleged owners of more than one-half of the land in said square, in February, 1898, made an application in writing to the Marshal to summon a jury to condemn the land necessary for the opening of a minor street in said square, to be known as Newport Place, by the widening of the 30-foot alley referred to, to a width of 60 feet and the extension of the same by that width through the square from 21st to 22d streets. Pursuant to such request, a jury so impanelled, and presided over by the Marshal's deputy, and not under the direction or control of any judicial tribunal, on March 17, 1898, made its award and finding whereby they undertook to condemn for the purposes of said street a part of said sublots 42 and 43 belonging to the petitioner, that is to say, 40 feet 3 inches, the width thereof, fronting upon said proposed street, by a depth of 15 feet, or one-fifth of the total area of said lots, and at the same time undertook to allow as the value of the land so taken, at the rate of 25 cents per foot, the sum of $82 for the part of sublot 42 and $75 as the value of the part of sublot 43 taken, but these amounts were never paid, but the jury sought to deduct the same from the total amount of the tax or charge apportioned against the residue of said lots, presumably as benefits. The jury, pursuant to the requirements of the law, undertook to apportion the total amount of damages awarded for land condemned, together with the costs of the proceeding against the lots in said square, and of this amount, they charged against the residue of said sublot 42, having a depth of 60 feet only, the sum of $650, less the sum of $82 allowed as the value of the part of said

lot taken, and against said sublot 43 the sum of $550, less the sum of $75 allowed as the value of the part of said lot appropriated.

The proceedings were conducted before a Marshal's jury, not subject to the control of any court, and without any rules or instructions to guide them, and the action of the jury was wholly without right of review or revision.

Pursuant to the findings of this jury, the Assessor of the District of Columbia undertook to levy against the residue of said sublots the amounts fixed by the jury as stated, which, together with the accumulation of interest at the high rate exacted by the District, remain as charges against said lots, and because of nonpayment the Collector has notified petitioner of his purpose to sell the same.

Thereafter there were levied against the lots of petitioner abutting on this alley (because it is an alley, notwithstanding its high-sounding name, but simply inhabitable under the law now when uninhabitable before), additional taxes against the property as follows: Water main tax, $50.41; sewer tax, $23.47; paving tax, $50.29; grading tax, $14.15; curb tax, $47.14.

Upon the filing of the petition, a writ of *certiorari* was granted, in response to which the record of the proceedings was returned to the court. Thereupon, the petitioner moved to quash the return (Record, p. 12) and for judgment cancelling the taxes. At the hearing before the Supreme Court of the District, upon this motion of the petitioner, the court overruled the motion, and, although no motion was made by the defendant for that purpose, dismissed the petition (Record, p. 13). From the judgment of the Supreme Court of the District overruling the motion to quash, and dismissing the petition, an appeal was prosecuted to the Court of Appeals of the District of Columbia, and that court, on the 8th day of November, 1905, affirmed the judgment of the court below.

Assignments of Error.

1. That the Supreme Court of the District of Columbia erred in dismissing the petition of the petitioner, appellant herein, and rendering judgment against said petitioner.

2. That said court erred in finding and holding that the act of Congress, pursuant to which the proceedings were had, is constitutional and valid.

3. That said court erred in finding and holding that the proceedings for the condemnation of the land and the assessment of benefits in these proceedings mentioned were in accordance with law and valid.

4. That the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District of Columbia.

5. That said Court of Appeals erred in finding and holding that the act of Congress pursuant to which the land of the petitioner, appellant herein, was condemned and the assessment against the residue of his property was made, is constitutional and valid.

6. That said Court of Appeals erred in finding and holding that the proceedings pursuant to which the land of the petitioner, appellant herein, was condemned and the assessment for benefits against the residue of his land was made, were in accordance with law.

BRIEF.

The petition alleges various objections to the tax under consideration which may be divided into two classes, first, those which relate to the constitutionality of the law itself, and secondly, those which relate to irregularities in the proceedings.

The act of Congress approved July 22, 1892 (27 Stat. L. 255) under which these proceedings were taken, provides as follows:

"SEC. 1. That the Commissioners of the District of Columbia be, and they are hereby, authorized to condemn, open, extend, widen or straighten alleys in the District of Columbia upon the presentation to them of the plat of the alley to be condemned, opened, widened, extended or straightened, accompanied by a petition of the owners of more than one-half of the real estate in the square in which such alley is sought to be opened, widened, extended or straightened, or when the Commissioners of the District of Columbia shall certify that the preservation of peace, good order, and public morals require that any such alley should be opened, extended, widened or straightened; or when the health officer of said District shall certify that such opening, extension, widening or straightening of an alley is necessary for the public health:

* * * * * *

"SEC. 4. That upon the filing of such plat by the surveyor in the office of the Commissioners of the District of Columbia as aforesaid, the said Commissioners shall make an application in writing to the marshal of the District of Columbia to summon and impanel a jury of twelve citizens who have no interest in the real estate mentioned in the said petition (and it is hereby made his duty to summon and impanel the same in all such cases upon application to him in writing by said Commissioners), and who, having first taken and subscribed an oath in writing to discharge the duty imposed upon them by the provisions of this act justly and impartially, shall proceed to ascertain and appraise the damages which may accrue to the real estate of any person or persons by the opening, extending, widening or straightening of such alley, which shall be the value of the land at the time of the taking, and they shall make and file a statement in writing, signed by them, of the damages so ascertained and appraised, in the office of the Commissioners of the District of Columbia, and a duplicate of said statement in the office of the recorder of deeds for the said District, and the

amount thereof shall be paid to the persons respectively entitled thereto by said District of Columbia, out of any funds available therefor; and all such alleys or extensions, widenings, or straightenings shall thereafter be kept open and free for public use.

"SEC. 5. That the said jury shall APPORTION an amount equal to the amount of said damages so ascertained and appraised as aforesaid, including six dollars for the services of said marshal and sixty dollars for the services of said jury, according as each lot or part of a lot of land in such square may be benefited by the opening, widening, extending, or straightening such alley:

"*Provided, however*, That in cases provided for in section two of this act the sums paid or agreed to be paid for the land contained in any alley or part of alley to be closed, shall first be deducted from the amount of benefits so to be assessed; and they shall make due return of such apportionment to the recorder of deeds and to the Commissioners of the District of Columbia, in which they shall designate each lot or part of a lot of land in such square so benefited, and the amount so apportioned to each, respectively; and, in case of failure to pay the amount so apportioned, it shall be the duty of the collector of taxes to levy a tax upon each said lot or part of a lot of land, in accordance with such apportionment, and to collect the same as other taxes upon real estate are collected; and said assessment shall bear interest at the rate of ten per centum per annum until paid.

"SEC. 6. That the said marshal shall give or cause to be given at least ten days' written or printed notice of the time and place of the meeting of such jurors for the purposes aforesaid to each proprietor of land in the square designated as the location of such alley."

The foregoing act was amended by the act of August 24, 1894 (28 Stat. L. 501) so as to authorize the opening of minor streets.

The Act of Congress is Unconstitutional.

The petition alleges that the act of Congress, under which the proceedings for the opening of Newport Place were had, is unconstitutional because it provides for the taking of private property for public use without just compensation and without due process of law, in that it provides for the apportionment of the total amount of the damages awarded for the land condemned, with the expenses of the proceedings added, among the lots in the square without regard to actual benefits; secondly, because the law limits the area of assessment to such particular square without reference to benefits to adjacent squares, and without regard to the fact that the actual benefits may not equal the total cost of the improvements; and lastly, because the act arbitrarily requires the assessment of such total costs to the particular square, *without a legislative determination of the actual benefits or the area benefited, such determination being impossible because said law is general in nature and was passed without a legislative consideration of the particular improvement long before the particular improvement was contemplated.*

In view of the decision of the Supreme Court in Wight, *v.* Davidson 181 U. S. 371, it is not questioned that Congress may direct the whole or part of the expense of a public improvement to be assessed upon the owners of land benefited thereby, and that the lands to be assessed may be either determined by Congress itself, by defining a territorial district, or by other designation, or it may be left by Congress to the determination of Commissioners, and may be made to consist of such lands, and such only, as the Commissioners decide to be benefited; and the rule of apportionment of the tax also rests within the discretion of Congress.

Wight *v.* Davidson, *supra*, and Bauman *v.* Ross, 167

U. S. 548, make it clear that there are but two ways of determining what lands shall be assessed for the cost of a public improvement; first, by Congress itself in the act authorizing the proceeding, which is considered to be a "legislative determination"; or, secondly, by a commission or other tribunal, "and be made to consist of such lands and such only, as the commissioners shall decide to be benefited." Bauman *v.* Ross, *supra.*

The act of Congress under which this proceeding was had provides "that the jury *shall apportion* an amount *equal to the amount of said damages* so ascertained and appraised as aforesaid (including expenses) according as each lot or part of lot of land in such square may be benefited."

That is to say, this act fixes the taxing area as the particular square in which the minor street is to be opened. This was fixed by Congress itself. It was not left to the jury. The only thing left to the jury was the apportionment—the act says "shall apportion"—of "an amount equal to the amount of said damages, that is to say, the total amount of damages, with expenses added. The assessment *area* was not left to the jury and "made to consist of such lands and such only, as the commissioners (jury) shall decide to be benefited," as held in Bauman *v.* Ross.

The area benefited, not having been left to the determination of the jury, it must have been and was in fact, in this case, fixed by Congress itself. The Supreme Court in Paulsen *v.* Portland, 149 U. S. 30, said that the legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district.

That is to say, Congress may itself, legislatively, determine the assessment area. And it is on the theory that

Congress itself legislatively determined the assessment areas that the various laws for the extension of streets in the District of Columbia, have been upheld; that is, the laws by which Congress fixed the assessment area and required the assessment of the whole or part of the cost of opening streets against the lands abutting upon the streets opened.

Neither element, absolutely necessary to the validity of such a law, was present in this case. The determination of the area benefited was not left to the jury; and Congress itself did not legally, because it could not, legislatively determine the area benefited by the opening of Newport Place.

When Congress directed the opening of S street, for instance, in the city of Washington, considered in Wight *v.* Davidson, and required the assessment of the cost against the abutting property, it had before it the particular situation, it knew, or is legally presumed to have known, what the expense of opening the street would be and whether the abutting property would be benefited in the amount equal to the cost of opening the street; and as said in Paulsen *v.* Portland, Congress is "supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the (assessment) district."

In this case there was no such legislative consideration *because there legally could not be.* It was an impossibility. The act authorizing the opening of streets, under which the Commissioners undertook to open Newport Place, was not a law dealing with that particular situation. It was a general law. It was passed years before there was any thought of opening this particular street. The particular Congress passing the law had long since passed out of existence. The situation in the District had changed. Congress did not know and could not have known that

six or more years thereafter an application would be made to open this particular street. It could not therefore have legislatively determined what property would be benefited, or that such property would be benefited to an amount equal to the total amount of damages awarded plus expenses. In this case the legislature is not "supposed to have made proper inquiry" because it could not and did not.

This law arbitrarily, without any legislative consideration of the particular improvement, fixes the minimum amount below which the assessment can not fall, and peremptorily directs that it be levied against all the property in this particular square, and wholly withdrew the question of benefits from the jury and left to it merely the question of apportionment. It is therefore in violation of the Constitution, because it required the jury to assess the costs of the improvement against petitioner's lots and the other lots in the square, without regard to the actual benefits, without permitting the jury to determine what property was benefited, and without a legislative determination of such benefits.

To illustrate the operation of this general law to situations not considered by Congress when it arbitrarily fixed the assessment area, we call attention to the fact that Twenty-second street, is but little improved but it so happened that on Twenty-second street, just in the line of the proposed street, there was a large three-story brick dwelling. Its removal was a positive detriment. Now, the benefit, if any, to the owners of the property in the square was not increased by the fact that the damages included a large sum paid for this house removed, and yet the assessment was increased to that very extent. The benefit to the square would have been just as much, waiving the fact that the removal of the house was a detriment, if there had been no house in the line of the proposed street.

How can it be reasonably said that the benefit was increased therefore by the value of the house removed? It is positively absurd. This law may be tested by considering what may be done under it by assuming a case in which the value of the property or building in the line of the proposed improvement is much greater than the house in the line of Newport Place. Assume that the majority of the owners in the square in which the Washington Loan & Trust Co. has its building should petition to the Commissioners to open a minor street in that square so as to pass through the place where that building stands. If there is any possible benefit to the remaining lots in the square, would it be greater because a very valuable building had to be removed? And would the benefits be increased by an amount equal to the value of the building removed? Yet, under this law, the total amount, including the value of the building, would have to be assessed against the remaining lots in the square. Is a law that permits or requires such a thing valid? We submit not.

The remarkable thing about the law is, that the provision under which this street was opened and under which an alley through the square referred to could be opened, that it does not depend upon the question of public necessity. The act authorizes the Commissioners to condemn the land necessary for an alley or minor street whenever the owners of more than one-half of the land in the square petition for it. It says the Commissioners "are authorized" to do so. In an act of Congress such words may well be taken to be mandatory and not discretionary. When such a petition is filed, the Commissioners are not required to find that the public needs require the street or alley to be opened. The only thing for determination is whether a sufficient number of people ask it. Such a law is obnoxious to one's sense of justice.

There is of course no parallel between this case and the case of a street improvement such as laying of sidewalk, curbing and the like, where the amount involved is small, per lot, the cost of the work is *well known and uniform* and the excess, if any above the cost, is used for the maintenance of a system of street improvements, as held in Parsons *v.* District of Columbia, which the minority of the court considered as the limit, and permitted to pass, as stated in the opinion in French *v.* Barber Asphalt Paving Co., because the court found that the cost of laying the improvement was not substantially in excess of the cost thereof.

Manifestly, a legislature can not be permitted to arbitrarily prescribe a fixed rule, where the improvement is of such character that its nature and cost would necessarily be different in different sections of a city, such as the opening of minor streets, the amount of cost depending upon the particular location of the minor street and the particular square and buildings to be destroyed and paid for in the course of opening the street. In one square there may be no buildings to be removed while in another, property valued at millions of dollars may have to be destroyed. Certainly Congress can not be permitted to arbitrarily prescribe a fixed rule and refuse either to determine itself in a particular case, the question of the extent of private benefits, or refuse to permit any other tribunal to do so. To say, by a wholesale or omnibus law, that in all cases arising, the entire cost of opening a minor street, no matter what that cost may be, and even though it is impossible to surmise or know in advance anything about the extent of such cost, or the particular circumstances or the particular case, shall be borne by those who happen to own property in the vicinity, clearly is not the law.

Norwood *v.* Baker, 172 U. S. 269, would seem to con-

trol this case, though this case is stronger, if anything, because here the act not only imposes the whole cost plus expenses as taxes against the property in a single square, but there was no legislative determination, as in the Norwood case, of the area benefited. In that case this court, in condemning the ordinance then before it, said:

> "The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost." (P. 290.)

In this case the whole cost of the improvement must be assessed. In the street extension cases, the proceedings are conducted under direction of the court, under its instructions and subject to its review. Here it was conducted before a Marshal's jury, presided over by his deputy, without instructions, and without regard to legal rules pertaining to evidence, and without right of review or revision.

We therefore respectfully contend that this alley and minor street law is unconstitional. It arbitrarily fixed the assessment area without a legislative determination of the area benefited, such a determination being an impossibility, and required the jury to apportion the total costs, plus expenses against the property in a single square.

No Right to Open the Street.

Assuming the validity of the law, the assessment should be quashed because the proceedings for the opening of Newport Place were not in accordance with law.

As heretofore referred to, there was no finding by the Commissioners that public interests required the opening of Newport Place, nor any finding by the health officer, in the terms of the act, that the public health required it. The proceedings were taken under the first clause of the

first paragraph of the act which directed the Commissioners to proceed upon petition of "the owners of more than one-half of the real estate in the square."

We submit that it is absolutely essential, as a basis for the validity of these proceedings, that it should appear that when the Commissioners ordered the Marshal to proceed, the owners of more than one-half of the real estate in the square requested it, and we deny that this was furnished or that the record shows it to have been done.

The returns found in the record show what persons signed the petition and also purport to show for what property. Among others it was signed by Evelyn B. Jones, as executrix of Mary E. Jones, deceased; Gertrude B. Moss by G. W. Moss, attorney; John M. Johnson, trustee; William L. Bramhall, trustee, and Richard L. Britton, trustee. If the property for which these persons signed were deducted, it would leave less than one-half of the property in the square owned by the remaining persons who requested the opening of the street. The authority of the persons named to sign is expressly denied in the petition and this denial is not met either in the answer or by the record returned.

It will be observed that the petition bears date on December 23, 1897. The Commissioners acted upon the certificate of the Assessor, found in the return, "that the records of the Assessor's office of the District of Columbia, show that on *December 23, 1897*, square 69 * * * contains 181,047 square feet of land and that on the *above date* the persons whose signatures are appended to the petition asking for the condemnation of land necessary to widen and extend alley in said square to a width of sixty feet, * * * *appear* to be the owners of 121,255 square feet of land in said square."

It will be noted that he certifies merely that according

to the records in the office of the Assessor, the persons who signed appear to be the owners. Is that evidence of ownership? The act requires that the petitioners *must* be the *owners*. Would an infant buy title on the basis of the accuracy of the records in the Assessor's office? The law does not require that his records shall be evidence of ownership. He does not even certify his belief in the accuracy of his records. He does not certify that the persons signing are in fact the owners. He could not. He merely certifies that according to his records, they "appear" to be the owners. At that time his records were made up, according to our recollection, biennially and were not kept up to date. The proceedings in this case however, were not ordered till *February 1, 1898*. It is clear the law contemplated that the persons petitioning should be the owners at the date the proceedings were ordered. This was not done. There is no sufficient evidence that they were in fact owners on December 23, and there certainly is no presumption that they were in fact the owners on February 1st of the succeeding year. There is no presumption of law that an executor has authority to deal with the real estate. An executor is not and can not be the owner of real estate, and yet executors signed. The law requires that "owners" shall request it. There is no presumption that George W. Moss, as "attorney" had any authority to sign on behalf of his wife, and there is nothing to indicate that the several persons who sign as "trustees" had any warrant in the premises.

It is a fact that there is no finding by the Commissioners themselves that the signers were the owners of more than one-half the property. It does not appear that they approved the report of the Assessor. We have, therefore, a case in which certain persons, to promote private ends, without any finding that the public interests required it, setting in motion the powerful machinery of

the government to condemn land of other citizens against their protest and without their consent. One rule of construction may well apply where such proceedings are inaugurated pursuant to a finding that the public interests required it, as suggested by the very act itself, but a different rule should apply where the proceeding is had at the request of private individuals to promote private ends, even though the land acquired thereby became public property. The right to take is restricted to a taking for public use. The use happens to be public here, but it was done to promote private ends. The power to take the land of a citizen against his consent is an obnoxious one and its exercise has always been carefully scrutinized by the courts. Is it possible that it was within the contemplation of the framers of the Constitution that this power should be exercised at the request of private individuals to promote private ends, even though the property acquired thereby became public property?

Cooley on Taxation [last edition], 3d edition, Vol. 2, page 1244, says:

> "Legislative action, if properly taken, is conclusive of the propriety of the proposed improvement, and of the benefits that will result, *if it covers that subject*, but it will not conclude as to the preliminary conditions to any action at all; such, for example, as that there shall be in fact such a street as they undertake to provide for the improvement of, or that the particular improvement shall be petitioned for or assented to by a majority or some other defined proportion of the parties concerned. This last provision *is justly regarded as of very great importance, and a failure to observe it will be fatal at any stage in the proceedings.* And any decision or certificate of the proper authorities, that the requisite application or consent had been made, *would not be conclusive, but might be disproved.*"

And in the note the author says (p. 1247):

> " Property owners whose property will be charged by the establishment of a paving district are entitled to insist that the several petitioners sign in such a way as to be fully and legally bound, and *no signatures which do not so bind the owners of the property purporting to be affected thereby may be counted in passing upon the validity of such a petition.*"

The same note states, and gives authorities in support thereof, that neither executors, administrators nor agents are owners entitled to validly sign such a petition.

The same rule obviously applies to persons signing as trustees, where there is nothing to indicate authority to sign, particularly where such authority is denied. If those signing as trustees are excluded, much less than one-half of the property was signed for in this case. A distinction will be noted in the signing by Messrs. Norment and Edwards, as trustees, who recognizing that mere trustees possess no such authorities, add to their signatures a statement that they are trustees with power of sale.

The fact that certain of the signers of the petition were trustees, indicates of course that they were not absolute owners—owners, in other words, which are the persons the law requires should sign. It also indicates that they have been entrusted with certain powers concerning the property. The fact that they are mere trustees negatives the idea of ownership with authority to do anything that prejudices the trust estate. It does not anywhere appear that they had any authority whatever in the premises. It was necessary that such authority should appear.

A naked or dry trustee certainly has no such authority.

Hill on Trustees, 461, 569.

In Mayor etc. *v.* Boyd, 64 Md. 10, the court calls attention to the fact that such assessment as made in that case

is not a mere personal charge against the owners, but a lien upon the whole property and the entire interest of life tenant and remainderman may be sold for its non-payment. Such being the case, it is apparent that a person signing as trustee must be such trustee of the entire estate, life estate, and free, with authority in the premises broad enough to authorize him to request proceedings that will result in a charge against the trust estate. There is nothing to show the existence of any such authority in this case. In the Maryland case mentioned, the court referred to the Act of Maryland, 1874, ch. 218, which expressly provides that tenants for ninety-nine years, with the executors and administrators of such tenants, or the guardian of an infant or a mortgagee in possession, should be taken as owner within the meaning of the law authorizing owners to petition for an improvement; but held that a life tenant had no such authority. Moreover, it excluded from consideration, a signature of one "Richard Cromwell, as trustee," the effect of which was to defeat the assessment. There is no statute, however, in the District, authorizing mere life tenants, executors, or attorneys to sign.

As also sustaining the proposition that the finding of the Commissioners that the requisite number of persons had signed, may be questioned, see—

Ziegler *v.* Hopkins, 117 U. S. 683.
Ogden City *v.* Armstrong, 168 U. S. 235, 236.
Mulligan *v.* Smith, 59 Cal. 225–229–239.

We submit, therefore, that the very basis of this entire proceeding is not in accord with the requirements of the law and that the assessment complained of should be quashed.

No Sufficient Notice.

Since Davidson *v.* New Orleans, 96 U. S. 97, and the many other cases to the same effect by this court, it

is undoubtedly the law that notice is essential to the validity of a special improvement tax.

In Allman *v.* D. C., 3 App. D. C. 20, the Court of Appeals said:

> "Seasonable notice at some serviceable stage of the proceeding is absolutely necessary to the validity of an assessment."

To the same effect is Davidson *v.* Wight, 16 App. D. C. 371.

It is obvious that the notice must indicate what is intended to be done pursuant to it. The law in this case directs that the "Marshal shall give or cause to be given at least ten days' notice written or printed of the time and place of the meeting of such jurors, for the purposes aforesaid." The purposes "aforesaid" were the assessment of damages *and* the assessment of benefits, or rather, in the words of the act, the apportionment of the damages. By reference to the return in this case it will be seen that the notice provides that there had been summoned "a jury of 12 disinterested citizens to ascertain the damages which may accrue to any individual or individuals by the opening of Newport Place as above stated in accordance with the plans and petition therein enclosed, you are hereby notified that the said jury so directed to be summoned as aforesaid, will meet to assess the said *damages* as aforesaid at the southwest corner of 21st and O streets." This is merely a notice of purpose to assess damages, and contains no reference whatever of a purpose to apportion the damages as benefits. Certainly a citizen is not expected to attend a street corner meeting pursuant to such a notice for the purpose of ascertaining what assessment may be made against his property, in the absence of notice of such purpose. We therefore insist that the notice in this case was insufficient and the proceedings thereunder, so far as they relate to the assessment of benefits, invalid.

There is no Finding of Benefits.

Giving the most liberal possible construction to the law and the acts thereunder, it is certainly true that, to sustain an assessment on the theory of benefits, there must be an actual finding by the jury that the property assessed is in fact benefited to the extent of the assessment. Looking to the return of the jury we find they say: "We ascertain, appraise and value the damage which may accrue to the real estate of any person or persons by the opening of said minor street and the closing of said alleys, said several amounts of damages being the value of the respective parcels of land at the time of taking, viz:" Now, that is a finding of damages in regular form. But they made no finding as to benefits. They merely return that they "hereby *apportion* the amount of said damages." * * (Rec., p. 10). Not a single word more; and not a suggestion, in fact, not a single word about *benefits*. They do not find and return that the several parcels of property therein mentioned are in fact benefited as therein stated. They merely add a list showing the *apportionment* of the damages. The fact is they did not make a finding of benefits and would not. We therefore contend that the proceedings are incurably defective in that there is no actual finding of benefits.

Assessment is in Excess of the Value of the Lots and in Excess of Benefits Received.

The word "confiscation" is frequently used in proceedings of this character without expectation that the word will receive its true and full signification. In this case, we characterize the assessment against this property as confiscation in its true sense. As we understand the law confiscation of private property by public authority is forbidden by the Constitution. If that be so, then the

confiscation of the petitioner's property by means of the extraordinary assessment levied against it, is in violation of the Constitution.

In Norwood *v.* Baker, *supra*, the Supreme Court, in discussing the case of Parsons *v.* District of Columbia, said :

> "If the cost of laying the water main in question in that case had exceeded the value of the property specially assessed, or had been in excess of any benefits received by that property, a different question would have been presented."

In numerous other cases it has held that any assessment for alleged benefits in substantial excess of the benefits received, is, to the extent of such excess, invalid, and if assessed under a rule or system without regard to actual benefits, the whole tax is invalid.

In this case the assessment for alleged benefits was twice the amount per foot, of the value of the land and twice the value of the entire land assessed. The jury finds the value of the land taken, which was part of the lots taken, the frontage in fact, to be worth 25 cents per foot, and allowed for the portion taken at that rate. The lots remaining were 40 feet front by a depth of 60 feet, and contained 2,400 square feet of ground. The value, on the basis of the finding of the jury itself, was $600. The tax against the property was $1,200, or exactly twice the value of the land. The assessment per foot as made by the jury was 50 cents, or twice the amount allowed as the value per foot for the property taken. Is that reasonable or can it possibly be valid? As said by the Supreme Court, if the assessment exceeds the value of the land assessed, a different question arises, which means, if it means anything, that such an assessment is invalid.

But the petition goes farther, and in good faith expressly

avers, and it is not denied, that with the alleged improvements added, that is to say, after the opening of the street, the lots plus the alleged benefits from the opening of the street with local improvements are worth less than the amount assessed as a tax against the property.

And as bearing upon the matter of confiscation, we call attention to the fact that there was an outstanding deed of trust upon this property, between which and the land has been interposed about $1,500 in special assessments, which utterly destroys the security of the note, and leaves petitioner liable for the amount of the note. We characterize the proceeding as confiscation and submit it is invalid.

We believe Newport Place is the only street opened under this obnoxious act. On December 14, 1903, recognizing the obvious injustice of this law, the Commissioners recommended to Congress its amendment—virtually its repeal—and wrote a letter in support thereof, found in Senate Report No. 4,589, 58th Congress, 3d Session, in which they say:

> "Under existing law alleys and minor streets are opened by a proceeding conducted out of court by a marshal's jury of twelve. The proceeding, consequently, is not a matter of record, is not subject to judicial supervision, and is extremely and unnecessarily expensive. The proposed bill puts this matter in line with all other condemnations of land for public uses in the District of Columbia. * * * Under existing law the entire cost, damages, and expenses of the condemnation for an alley or a minor street must be assessed exclusively upon the land in that particular square, the *function of the jury simply being to apportion that amount within that area. This is wrong in principle and results in great injustice in practice.*
>
> "If an alley or a minor street is to be opened and

> property adjacent to the square through which the alley or minor street is to pass is benefited, as in a great majority of cases it is, such property should bear the burden to the extent that it may be benefited. This just principle was carried into the street extension acts of 1900, and is embodied in this bill."

In other words, recognizing the rank injustice of proceedings under the law now assailed, the authorities of the District, who are now resisting this proceeding, themselves applied to Congress to change the law because, as they say, "it is wrong in principle" and "results in great injustice in practice." The great injustice in practice to which reference is made is the unjust assessments in square 69 resulting from the opening of Newport Place.

Congress at the last session has adopted the views of the Commissioners and passed a bill relieving the present law from all the objections now made, by providing for notice, for hearing under direction of a court, for right of review, for assessment according to benefit, and extending the area of assessment to include all property actually benefited.

Justice seems to require that this particular tax should be annulled and we trust it will be done.

Respectfully submitted,

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